

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RITA RIOS)	
Claimant)	
VS.)	
)	Docket No. 176,751
EXCEL CORPORATION)	
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award entered by Special Administrative Law Judge William F. Morrissey on January 7, 1997. The Appeals Board heard oral argument June 25, 1997.

APPEARANCES

Claimant appeared by her attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Wendel W. Wurst of Garden City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has adopted stipulations listed in the Award except for the stipulation listed as No. 6 relating to functional impairment. The Award states the parties have stipulated to a functional impairment of 13 percent. The Board finds the parties did not agree or stipulate to the extent of functional impairment.

ISSUES

The Administrative Law Judge awarded benefits for a 13 percent permanent partial general disability based upon functional impairment. Claimant contends she should be awarded benefits for a higher work disability. Respondent, on the other hand, contends that the award should be based on a lower functional impairment of 8 percent. The nature and extent of claimant's disability is the only issue on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds, based upon the findings of fact and conclusions of law stated below, that claimant is entitled to benefits based upon an 11 percent disability for functional impairment from December 21, 1992, through March 28, 1994, and a 47 percent work disability thereafter.

Findings of Fact

1. Claimant suffered bilateral upper extremity injuries as a result of repetitive work activities through December 21, 1992.
2. At the time of the injuries, claimant had worked for respondent for over five years and her job was boxing intestines.
3. Guillermo Garcia, M.D., treated claimant's injuries from February 22, 1993, through September 29, 1993. He diagnosed bilateral rotator cuff tears and lateral epicondylitis of the right elbow. After conservative treatment in the form of physical therapy and anti-inflammatory medications, Dr. Garcia recommended surgery for the rotator cuff tears. Claimant decided not to have the surgery. Dr. Garcia rated claimant's impairment as 10 percent to the body as a whole. He recommended she not work at or above shoulder level; that she limit pushing, pulling, and lifting to 25 pounds; and that she not shovel or sweep.
4. In early March 1994, respondent asked claimant to identify, by touring the plant, a job or jobs she felt she would be able to perform with her injuries. Claimant picked seven or eight jobs, including the Japanese Machine, and respondent then offered claimant a job operating the Japanese Machine. Claimant was given two weeks to qualify on the Japanese Machine by meeting certain production levels. Claimant did not qualify and was terminated March 28, 1994. Dr. Garcia had concluded claimant should be able to perform the duties required of a Japanese Machine operator.
5. The Appeals Board finds claimant made a good faith effort to perform the duties required in operating the Japanese Machine but, in part because of her injuries, was not able to qualify. This conclusion is based on claimant's testimony as well as the testimony of Jose Flores, the union steward. Mr. Flores testified that it is not uncommon for employees to have more difficulty than expected operating and qualifying on the Japanese

Machine. He stated it looks simple and easy but a lot of people try it and are dismissed. He described the machine as the door to the outside and testified he had tried to get respondent to allow more time to qualify.

6. Aly M. Mohsen, M.D., performed an evaluation on claimant's behalf. He diagnosed the following:

- a. Bilateral rotator cuff tendinitis and bursitis.
- b. Bilateral rotator cuff tear.
- c. Bilateral lateral epicondylitis and tendinitis.
- d. Entrapment syndrome with the associated tenosynovitis and tendinitis of both long extensors with early sign of radial nerve entrapment at the elbow and sign of posterior compartment syndromes.

He rated claimant's impairment as 16 percent of the whole body and recommended restrictions of no lifting more than 15 to 20 pounds on a frequent basis; 20 to 30 pounds on an occasional basis; and limit use of hand tools to only an occasional basis. He also indicated the claimant should not lift above the shoulders more than 15 to 20 pounds on an occasional basis. From review of a videotape, he concluded the operation of the Japanese Machine would not violate the restrictions he recommended.

7. C. Reiff Brown, M.D., performed an independent medical examination at the request of the Administrative Law Judge. He saw claimant in January 1995 and diagnosed bilateral biceps and rotator cuff tendonitis with partial tear of the rotator cuff tendon which he stated had healed "fairly well." In his report, Dr. Brown comments that some of the symptoms noted by Dr. Mohsen had subsided, possibly due to the decrease in activity. Dr. Brown also diagnosed mild lateral epicondylitis on the right but found no evidence of lateral epicondylitis on the left. He noted mild stenosing tendonitis involving the thumb flexor on the left and midfinger flexor on the right. He rated claimant's impairment as 8 percent of the body as a whole. As restrictions, he stated:

She will need to permanently avoid use of hook and knife because of the stenosing tendonitis of the flexor tendons. She will need to permanently avoid frequent extension of the wrists, especially against load, in order to avoid increasing lateral epicondylitis. She also will need to avoid frequent movement of the hands above shoulder level and a movement of the arms at waist level through a range that would abduct the humerus away from the body more than 60 degrees. There is no lifting limit from floor to waist, however, from waist to shoulder she should not lift more than 10#.

Dr. Brown concluded, from viewing a video tape of the operation of the Japanese Machine, that claimant could perform the duties required to operate that machine. He also testified she might experience symptoms when operating the machine. He opined the symptoms claimant attributed to the work operating the Japanese Machine may have been because she was not given enough time to get used to operating the machine.

8. Based on the functional impairment ratings by Dr. Garcia (10 percent to the body as a whole), Dr. Mohsen (16 percent to the body as a whole), and Dr. Brown (8 percent to the body as a whole), the Board finds claimant's functional impairment is 11 percent.

9. The Appeals Board concludes, based on testimony of claimant and Jose Flores, the videotape shown to the physicians does not reveal the full difficulty of operating and qualifying on the Japanese Machine.

10. After respondent terminated her employment, claimant made a good faith effort to find other employment. Claimant has six years of education in Mexico and limited English language skills.

11. Based on the testimony of Donald E. Vander Vegt, the only vocational expert to testify in this case, the Appeals Board finds claimant suffered a 60 percent loss of ability to perform work in the open labor market and a 34 percent loss of ability to earn a comparable wage.

Conclusions of Law

1. For the period from the stipulated date of accident of December 21, 1992, through March 28, 1994, the date claimant left work for respondent, claimant is entitled to benefits for an 11 percent disability based on functional impairment. During that period, claimant earned a wage comparable to the preinjury wage. K.S.A. 1992 Supp. 44-510e.

2. Beginning March 28, 1994, claimant is entitled to work disability. K.S.A. 44-510e. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997); Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

3. The Appeals Board concludes claimant's work disability is 47 percent. This conclusion is reached by giving equal weight to the loss of wage earning ability and the loss of ability to perform work in the open labor market. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Special Administrative Law Judge William F. Morrissey, dated January 7, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rita Rios, and against the respondent, Excel Corporation, for an accidental injury which occurred December 21, 1992, and based upon an average weekly wage of \$421.86, for compensation at the rate of \$30.94 per week from December 21, 1992, through March 28, 1994, (66 weeks) or \$2,042.04 for an 11% functional disability, followed by 349 weeks at the rate of \$132.19 per week or \$46,134.31, for a 47% permanent partial work disability, making a total award of \$48,176.35.

As of January 30, 1998, there is due and owing claimant 66 weeks permanent partial disability compensation at the rate of \$30.94 per week or \$2,042.04, followed by 200.57 weeks of permanent partial disability compensation at the rate of \$132.19 per week in the sum of \$26,513.35 for a total of \$28,555.39, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$19,620.96 is to be paid for 148.43 weeks at the rate of \$132.19 per week, until fully paid or further order of the Director.

The Appeals Board adopts all other orders entered in the Award by the Special Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
D. Shane Bangerter, Dodge City, KS
Wendel W. Wurst, Garden City, KS
Kenneth S. Johnson, Administrative Law Judge

RITA RIOS

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DOCKET NO. 176,751

Philip S. Harness, Director